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No. 93-559

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE,
Petitioner,

vs.

JENNIFER ROBERTS, et al.,
Respondents.

On Petition for Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE COMMONWEALTH OF PENNSYLVANIA, THE COMMONWEALTH OF PUERTO RICO, AND THE STATES OF ARIZONA AND NORTH CAROLINA

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QUESTION PRESENTED

I. Whether Title IX of the Education Amendments of 1972 requires that the gender composition of a university's athletic program mirror that of its student body?

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INTEREST OF THE AMICI

Amici states all operate systems of higher education which receive federal funds. In 1991, student enrollment in higher education reached 14,157,000.[1] Of these, over 10 million students were in public undergraduate colleges.[2] Over the next ten years, overall enrollment is projected to rise to 16,030,000 students with 12,478,000 enrolled in public colleges.[3] Amici thus serve the needs of a large number of the nation's college students. For this reason alone their interest in this case is strong. Added, however, is the consideration that continuing federal funding is essential to the maintenance of amici's educational

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[1] Digest of Eduction Statistics (1992), Table 2, page 11.

[2] Ibid.

[3] Id. Table 3, page 12.

systems. In 1992 federal expenditures on education was over 75 billion dollars.[4] A large portion of this was dedicated to higher education. In order to continue receiving these federal funds, amici must comply with Title IX, 20 U.S.C. § 1681, et seq. Because the resolution of this case will assist them in ensuring their compliance with the law, amici herein assert their interest.

As with most colleges and universities, amici's schools offer athletic competition as an extra curricular activity and, thereby come under the auspices of Title IX's requirements governing gender discrimination in intercollegiate athletics. The amici intend and desire fully to comply with Title IX, however,

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[4] Id. Table 348, page 369.

this task has grown more challenging with ever-increasing enrollments[5] and ever-shrinking budgets.[6] Recent decisions involving Title IX have added to this burden by generating controversy and confusion as to what the law requires. Lacking certainty, state educational institutions are finding it difficult to develop long-range plans for their athletic programs and to budget for the upcoming year.

Amici states have a significant interest in a resolution of the questions

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[5] Inasmuch as elementary and secondary schools are increasing in enrollment, Ibid. Table 41, pp. 52-53, it is likely that higher education enrollment will continue to swell.

[6] In the past year, there were 15 lawsuits filed asserting violations of Title IX in a university's athletic program. With each case, the issue arose when cutbacks in the budget forced the elimination of certain sports, usually equal numbers of men's and women's teams.

which have arisen concerning compliance with Title IX, in particular, whether they are required to maintain gender-based athletic programs which mirror the gender proportions of their student enrollment. Desirous of conforming to the law, amici states are seek guidance from this Court and urge that these matters be clarified for the benefit of the students and the student-athletes as well as the colleges and universities.

SUMMARY OF ARGUMENT

While the plain language of Title IX disavows basing a violation of its provisions solely upon a statistical disparity, the policy statement interpreting Title IX allows for a finding of noncompliance where the percentage of female athletes is not substantially proportionate with that of the female enrollment. In subsequent court decisions, the most recent of which is Roberts v. Colorado State Board of Agriculture, the proportionality requirement has been elevated to the determinant criteria. An educational institution desiring to satisfy Title IX thus is left to establish a system of preferential treatment for female athletes or be subject to litigation.

With this case, the Court can resolve the uncertainty surrounding the meaning of

the policy statement and return the proportionality standard to its rightful place as one factor to be examined in an assessment of a university's overall athletic program rather than as a goal to be achieved in and of itself.

ARGUMENT

I. TITLE IX's REJECTION OF A GENDER BASED QUOTA SYSTEM IS AT ODDS WITH THE DEPARTMENT'S POLICY STATEMENT AND THE RECENT DECISIONS OF THE COURTS.

In 1972, the United States Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., a broadly worded prohibition of gender-based discrimination in education programs or activities.[7] The Department of Education subsequently effected

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[7] Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a)

detailed regulations implementing Title IX. 34 C.F.R. § 106.1, et seq. In these regulations, the Department outlines ten components of intercollegiate competition to be examined when assessing compliance with Title IX in college athletic programs. 34 C.F.R. § 106.41.[8] By the

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[8] 34 C.F.R. § 106.41(c) provides:

> (c)Equal Opportunity. A recipient . . . shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director [of OCR] will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provisions of equipment and supplies;
> (3) Scheduling of games and practice times;
> (4) Travel and per diem allowance;

end of July, 1978, it became apparent that there was widespread confusion regarding the requirements of Title IX and the regulations for intercollegiate athletic programs. The Department, therefore,

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(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

Unequal aggregate expenditures . . . for male and female teams . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

issued a Policy Interpretation of its regulations for use as guidance to university administrators for athletic programming. 44 Fed. Reg. 71, 413 et seq. (1979). The current dilemma over the meaning of Title IX has been created by the courts' interpreting the policy statement's interpretation of the regulations implementing Title IX. The more Title IX is interpreted, the more unclear its message becomes and the more it grows attenuated from its original meaning.

Title IX clearly states that nothing in its provisions "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in . . . any

federally supported program or activity, in comparison with the total number or percentage of persons of the sex in any community." 20 U.S.C. § 1681(b). At its inception, Title IX, while it prohibited discrimination, specifically rejected the requirement that a university adopt a gender-based quota system. The implementing regulations, while not requiring a quota system, took a step away from Title IX's proviso by stating that a voluntary affirmative action plan would be acceptable to the Department, 34 C.F.R. § 106.3(b).

With specific regard to intercollegiate athletics, the Department, in its policy interpretation of the regulations, despite the plain language of Title IX, suggested that the effectiveness of an institution's accommodation of athletic interests and abilities (one of

the ten areas of examination pointed out by the regulations) be assessed by determining "whether intercollegiate level participation opportunities for male and female student's are provided in numbers substantially proportionate to their respective enrollments. 44 Fed. Reg. 71, 418 (1979).[9] This obvious tension between the statute and the policy interpretation has been augmented by recent court decisions. These have, in effect, required college and universities to establish quota systems giving preferential

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[9] Where substantial proportionality is not provided by an institution, the Department looks for a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented sex or for a demonstration that the current program fully and effectively accommodates the interests and abilities of the underrepresented sex. 44 Fed. Reg. 71, 418 (1979). As discussed, infra the meaning of these two additional steps has been muddied by case law assessing Title IX compliance.

treatment to women athletes, as the only "safe" way for an institution of higher education to avoid expensive and protracted litigation over its choice of athletic offerings.

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993), was the first of the appellate decisions to attempt to reconcile the apparent discrepancy between the language of the statute and the language of its policy interpretation. In Cohen, the Court of Appeals first recognized that "a Title IX plaintiff in an athletic discrimination suit must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need amongst the members of the disadvantaged gender." Id. at 895. The Court of Appeals, however, then observed that in its view "a university which does

not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup," Id. at 898; and instructed institutions that they must "remain vigilant . . . until the opportunities for, and levels of, competition are equivalent by gender." Id. at 898 (emphasis added). In sum, although the court begins by indicating that disparate impact alone is insufficient to prove a Title IX violation, it ends by setting equivalency by gender as the ultimate goal.

In Favia v. Indiana University of Pennsylvania, 812 F.Supp. 578 (W.D. Pa.), the District Court treated a violation of the policy interpretation's requirement of proportionality between the percentage of female athletes and the percentage of

female enrollment as a presumption of discrimination. The District Court placed the burden upon the university to rebut this presumption by proving that it satisfied one of the two remaining ways of assessing the provision of equal athletic opportunity, i.e., by showing program expansion defined as increasing the number of opportunities, or by showing that its program accommodated the interests and abilities of its students. Id. at 584-585. Favia required what Cohen required - a quota of female athletes based upon female enrollment.

In Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir. 1993), the Court of Appeals describes the requirement of substantial proportionality as a safe harbor for colleges and universities, Id. at 829. Under this view, there is no need to further examine

an athletic program if the number of female athletes is substantially proportionate to the female enrollment. Roberts purports to disown the notion that an institution is required by Title IX to maintain gender balance. Id. at 829, fn. 5&6. Nevertheless, Roberts requires institutions to move toward athletic participation rates which are substantially proportionate to enrollment, Id. at 830; and concludes by holding that disparate impact alone is sufficient to establish discrimination under Title IX. Id. at 832-833.

With each decision, the confusion grows as the courts move toward the establishment of a de facto quota requirement which is directly at odds with the statute itself. As was stated by one Court, "Quite frankly, these interpretations have converted Title IX

from a statute which prohibits discrimination on the basis of sex (defined as the elimination of or exclusion from participation opportunities) into a statute which provides 'equal opportunity for members of both sexes.'" Kelley v. Board of Trustees of the University of Illinois, 1993 U.S. Dist. LEXIS 12256,*8 (M.D. Ill. 1993). The Court should take this opportunity to correct the course set by the courts below and return the proportionality standard to its rightful place as one factor to be examined in an assessment of a university's overall athletic program rather than as a goal to be achieved in and of itself and at the expense of all others.

Added to the above is the inability of a Title IX defendant to challenge in any meaningful way the statistical

comparison prescribed by the policy interpretation, in which the sole relevant comparison is between the percentage of female athletes and the percentage of female students. No allowance is made for students who lack athletic ability or who lack interest in participating in sports. See, Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 999 (1988) ("[S]tatistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"). With no ability to rebut the relevance or accuracy of these statistics, there is effectively no ability to defend.

Under the current state of the law, then, a Title IX defendant is powerless to rebut a plaintiff's statistics, and yet this purported statistical imbalance may well be the sole criteria against which its program will be judged. This case

presents a clear opportunity to answer these questions. The amici states therefore urge this Court to resolve the confusion regarding the proper interpretation of the policy statement's proportionality requirement and its role in assessing a Title IX violation.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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